



I-9 Compliance



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➤ Presenter

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Alejandro assists employers facing a variety of employment disputes, including employment discrimination, sexual harassment, wrongful termination, workplace torts, trade secret/anti-piracy, non-compete agreements and unfair competition litigation and arbitration. Alejandro's clients value his proactive and practical approach to identifying preemptive HR strategies that increase employee job satisfaction, minimize risk, and reduce overall litigation costs.



➤ Introduction

- The Immigration Reform and Control Act of 1986 (IRCA) requires all US employers to verify the identity and employment eligibility of all new employees hired after November 6, 1986.
- This requirement is satisfied by having new employees complete Form I-9 with the employer.
- Employers are subject to the same laws regardless of which state they operate in and whether they are using paper or electronic I-9 forms.
- This presentation discusses:
 - IRCA's requirements
 - How to complete Form I-9 (Sections I, II, and III)
 - E-Verify
 - Storing and retaining Form I-9
 - Current flexibility
 - Potential violations
 - Audits and investigations
 - Best practices.

➤ The IRCA

- Enacted by Congress to eliminate employment as an incentive for foreign nationals unlawfully coming to or remaining in the US
- Employers cannot hire, or recruit or refer for a fee, individuals who are not authorized to work in the US
- Employers must confirm the identity and employment eligibility of all new employees hired after November 6, 1986

➤ The IRCA (continued)

- IRCA bars employers from hiring or continuing to employ unauthorized workers
- IRCA contains three major requirements for employers:
 - Complete the I-9 Form
 - Retain documents
 - Do not discriminate

➤ Completing Section One

- Employees must complete section one on the first day of work
- Employees should provide:
 - His or her full legal name
 - Address, email and telephone number
 - Date of birth
 - Indicate immigration status (and other relevant information)
 - Social security number



▶ **START HERE:** Read instructions carefully before completing this form. The instructions must be available, either in paper or electronically, during completion of this form. Employers are liable for errors in the completion of this form.

ANTI-DISCRIMINATION NOTICE: It is illegal to discriminate against work-authorized individuals. Employers **CANNOT** specify which document(s) an employee may present to establish employment authorization and identity. The refusal to hire or continue to employ an individual because the documentation presented has a future expiration date may also constitute illegal discrimination.

Section 1. Employee Information and Attestation (Employees must complete and sign Section 1 of Form I-9 no later than the first day of employment, but not before accepting a job offer.)

| | | | | | | |
|----------------------------------|-----------------------------|-------------------------|---------------------------|----------------|--------------------------------|----------------|
| Last Name (Family Name) | | First Name (Given Name) | | Middle Initial | Other Last Names Used (if any) | |
| Address (Street Number and Name) | | | Apt. Number | City or Town | | State ZIP Code |
| Date of Birth (mm/dd/yyyy) | U.S. Social Security Number | | Employee's E-mail Address | | Employee's Telephone Number | |

I am aware that federal law provides for imprisonment and/or fines for false statements or use of false documents in connection with the completion of this form.

I attest, under penalty of perjury, that I am (check one of the following boxes):

| | |
|--|---|
| <input type="checkbox"/> 1. A citizen of the United States | |
| <input type="checkbox"/> 2. A noncitizen national of the United States (See instructions) | |
| <input type="checkbox"/> 3. A lawful permanent resident (Alien Registration Number/USCIS Number): _____ | |
| <input type="checkbox"/> 4. An alien authorized to work until (expiration date, if applicable, mm/dd/yyyy): _____ Some aliens may write "N/A" in the expiration date field. (See instructions) | QR Code - Section 1 Do Not Write in This Space |
| Aliens authorized to work must provide only one of the following document numbers to complete Form I-9: An Alien Registration Number/USCIS Number OR Form I-94 Admission Number OR Foreign Passport Number. | |
| 1. Alien Registration Number/USCIS Number: _____ OR | |
| 2. Form I-94 Admission Number: _____ OR | |
| 3. Foreign Passport Number: _____ Country of Issuance: _____ | |

| | |
|-----------------------|---------------------------|
| Signature of Employee | Today's Date (mm/dd/yyyy) |
|-----------------------|---------------------------|

Preparer and/or Translator Certification (check one):
 I did not use a preparer or translator. A preparer(s) and/or translator(s) assisted the employee in completing Section 1.
 (Fields below must be completed and signed when preparers and/or translators assist an employee in completing Section 1.)

I attest, under penalty of perjury, that I have assisted in the completion of Section 1 of this form and that to the best of my knowledge the information is true and correct.

| | | | |
|-------------------------------------|--|---------------------------|----------------|
| Signature of Preparer or Translator | | Today's Date (mm/dd/yyyy) | |
| Last Name (Family Name) | | First Name (Given Name) | |
| Address (Street Number and Name) | | City or Town | State ZIP Code |

STOP Employer Completes Next Page STOP

➤ Completing Section Two

- Section Two is the employer's responsibility
- Section Two must be completed by the third day of employment unless employment is for three days or less
- Employer duties:
 - Review original documents evidencing identity and employment authorization; and
 - Complete and sign Section 2
- Section Two is the employer's responsibility
- Section Two must be completed by the third day of employment



Section 2. Employer or Authorized Representative Review and Verification
(Employers or their authorized representative must complete and sign Section 2 within 3 business days of the employee's first day of employment. You must physically examine one document from List A OR a combination of one document from List B and one document from List C as listed on the "Lists of Acceptable Documents.")

| | | | | |
|--|-------------------------|---------------------------------------|------------|--|
| Employee Info from Section 1 | Last Name (Family Name) | First Name (Given Name) | M.I. | Citizenship/Immigration Status |
| List A Identify and Employment Authorization | OR | List B Identity | AND | List C Employment Authorization |
| Document Title | | Document Title | | Document Title |
| Issuing Authority | | Issuing Authority | | Issuing Authority |
| Document Number | | Document Number | | Document Number |
| Expiration Date (if any) (mm/dd/yyyy) | | Expiration Date (if any) (mm/dd/yyyy) | | Expiration Date (if any) (mm/dd/yyyy) |
| Document Title | | Additional Information | | QR Code - Sections 2 & 3 Do Not Write In This Space |
| Issuing Authority | | | | |
| Document Number | | | | |
| Expiration Date (if any) (mm/dd/yyyy) | | | | |
| Document Title | | | | |
| Issuing Authority | | | | |
| Document Number | | | | |
| Expiration Date (if any) (mm/dd/yyyy) | | | | |

Certification: I attest, under penalty of perjury, that (1) I have examined the document(s) presented by the above-named employee, (2) the above-listed document(s) appear to be genuine and to relate to the employee named, and (3) to the best of my knowledge the employee is authorized to work in the United States.

The employee's first day of employment (mm/dd/yyyy): _____ (See instructions for exemptions)

| | | |
|--|---|--|
| Signature of Employer or Authorized Representative | Today's Date (mm/dd/yyyy) | Title of Employer or Authorized Representative |
| Last Name of Employer or Authorized Representative | First Name of Employer or Authorized Representative | Employer's Business or Organization Name |
| Employer's Business or Organization Address (Street Number and Name) | | City or Town |
| | | State |
| | | ZIP Code |

Section 3. Reverification and Rehires (To be completed and signed by employer or authorized representative.)

| | | | | |
|-----------------------------|-------------------------|----------------|-----------------------------------|--|
| A. New Name (if applicable) | | | B. Date of Rehire (if applicable) | |
| Last Name (Family Name) | First Name (Given Name) | Middle Initial | Date: (mm/dd/yyyy) | |

C. If the employee's previous grant of employment authorization has expired, provide the information for the document or receipt that establishes continuing employment authorization in the space provided below.

| | | |
|----------------|-----------------|---------------------------------------|
| Document Title | Document Number | Expiration Date (if any) (mm/dd/yyyy) |
|----------------|-----------------|---------------------------------------|

I attest, under penalty of perjury, that to the best of my knowledge, this employee is authorized to work in the United States, and if the employee presented document(s), the document(s) I have examined appear to be genuine and to relate to the individual.

| | | |
|--|---------------------------|---|
| Signature of Employer or Authorized Representative | Today's Date (mm/dd/yyyy) | Name of Employer or Authorized Representative |
|--|---------------------------|---|

➤ Completing Section Two: To Photocopy or Not to Photocopy?

- Employers may choose to photocopy employee-presented documents so long as it's done pursuant to a uniform policy
- Employers **MUST** retain copies of the following:
 - U.S. Passport
 - U.S. Passport card
 - Green Card
 - Employment Authorization Documents

➤ Properly Reviewing Documents

- Review the documents to ensure they are valid and not fraudulent
- Ensure the documents relate to the person offering them by comparing the name and any photograph to the employee
- Accept any documents that the employee presents that satisfy the Form I-9 list of acceptable documents

NOTE: An employer is forbidden from requiring or requesting specific documents

- As a best practice, if the employee presents too many documents, the employer should give the employee a copy of the Form I-9 list of acceptable documents (listed on the Form I-9 in Lists A, B, and C) and ask the employee to pick the documents to be used for the Form I-9

➤ Storing and Maintaining I-9 Forms

- Employers must retain **I-9** forms (and any photocopies of presented documents) for each employee hired after November 6, 1986
- Employers should store **I-9** forms and any photocopies of presented documents separately from employee personnel files
- Employers should retain **I-9** forms and any photocopies in an organized manner that allows employers to easily access, sort, and present them to **US Immigration and Customs Enforcement (ICE)** within 72 hours if they are requested

➤ Storing and Maintaining I-9 Forms (continued)

Former Employees: If an employee's employment ends, the employer must retain the Form I-9 (and document photocopies) for the longer of:

- Three years from the employee's hire; or
- One year from the employee's termination
- Calculating retention periods
 - Calculate the Form I-9 document destruction date when employees terminate employment; and
 - Periodically review their I-9 forms to ensure they destroy any documents that can be eliminated

➤ COVID-19 and I-9 Guidelines

- The Department of Homeland Security (“DHS”) has announced temporary flexibility related to Form I-9 requirements.
- Employers with employees taking physical proximity precautions due to COVID-19 will not be required to review the employee’s identity and employment authorization documents in the employee’s presence until normal operations resume. Employers, however, are required to inspect Section 2 documents remotely and obtain, inspect and retain copies of the documents within three business days.
- Employers who wish to utilize themselves of this new option must prepare written documentation of their remote onboarding and telework policy for each employee.
- Once normal operations resume, all employees onboarded using remote verification must report to their employer within three business days for an in-person verification and present their employment eligibility documentation. Once the physical inspection takes place, employers should enter “COVID-19” as the reason for the physical inspection delay in Section 2’s “Additional Information” field.

➤ COVID-19 and I-9 Guidelines (continued)

- Employers with employees still physically present at a work location may not avail themselves of this provision. There are no exceptions currently available for such employers.
- Employers not eligible for the exception, however, may have some options available to them. Recent updates to Form I-9 allow an employer to designate a representative to review new hires' documents. Such representatives can be a law firm, a vendor, a notary, or a local employee. Employers choosing this route, however, should exercise caution when representing a third-party to ensure the representative is well-versed in Form I-9 compliance.
- Applicable employers may implement these provisions for a period of 60 days from the notice's date or within three business days after the termination of the National Emergency, whichever comes first.

➤ I-765 Acceptance Letters

The USCIS is allowing employers to accept Form I-797, Notice of Action with a date on or after December 1, 2019 through August 1, 2020 to update Form I-9, Employment Eligibility Verification and show continued work authorization.

- Employers seeking to take advantage of the I-9 flexibility must ensure the following:
 - The I-797, Notice of Action must explicitly indicate it is an approval of an Application for Employment Authorization (Form I-765);
 - If the first requirement is met, the I-797 can be listed as a List C document—specifically under item number seven

➤ Unlawful Discrimination

- Employers must not discriminate against an employee in the Form **I-9** completion process. An employer improperly discriminates by:
 - Improperly making hiring decisions based on national origin, if the employer has between four and 14 employees (instead of IRCA, employers with 15 or more employees are covered by **Title VII of the Civil Rights Act of 1964** (Title VII) regarding national origin discrimination (for more information on national origin discrimination under title VII check out: <https://www.eeoc.gov/laws/types/nationalorigin.cfm>)
 - Improperly making hiring decisions based on citizenship; or
 - Requiring new employees to present specific or additional documents of identity or employment eligibility
- Employers must not retaliate against an employee based on the employee's complaint or participation in a complaint regarding IRCA discrimination

➤ E-Verify

- E-Verify is a free electronic employment eligibility system co-managed by the Department of Homeland Security (DHS) and Social Security Administration (SSA)
- E-Verify enrollment is:
 - Mandatory for certain federal contractors and subcontractors
 - Mandatory for employees in certain states
 - Voluntary for all other employers

➤ The E-Verify Process

- Within three days after the employee begins work:
 - Complete the Form I-9 process
 - Obtain the employee's social security number (SSN)
 - Create and submit an E-Verify case using the Form I-9 information, including the SSN, in the E-Verify system
 - Track the results of the E-Verify case and retain with the Form I-9

➤ E-Verify Responses

- The employer will receive an immediate online response indicating one of the following:
 - The employee is authorized to work
 - The DHS needs additional time to review its records
 - A tentative non-confirmation (TNC) that the SSA or DHS records cannot confirm the employee's SSN or employment authorization

➤ Resolving a TNC

- If the employer receives a TNC response, it must:
 - Promptly notify the employee
 - Print and review the TNC with the employee
 - Confirm the accuracy of the employee's information in the E-Verify system
 - Ask the employee if they will contest the TNC, indicate the employee's choice on the further action notice, and, with the employee, sign and date the notice
 - Provide a copy of the further action notice to the employee while retaining the original

➤ Resolving a TNC (continued)

- The SSA and DHS have up to ten federal workdays to resolve the issue and update E-Verify
- Updated results may include:
 - Employment authorized
 - SSA or DHS final non-confirmation
 - SSA or DHS case in continuance
 - Review and update employee data
 - DHS no show

➤ Closing E-Verify Case

- After receiving a final response from E-Verify, the employer must:
 - Indicate what action the employer will take regarding an employee
 - Close the E-Verify case

➤ Potential Liability

- IRCA's employment eligibility verification requirements are enforced by the **Department of Homeland Security's (DHS) Bureau of Immigration and Customs Enforcement (ICE)**, through both civil and criminal audits and investigations. Employers may be subject to significant public censure, criminal charges, and civil penalties for IRCA violations.
- Possible IRCA violations include:
 - Knowingly hiring or continuing to employ an individual who is unauthorized to work in the US
 - Requiring employee payment of an indemnity bond
 - Paperwork violations, including errors in completing the Form I-9

➤ Knowing Violations: Hiring Unauthorized Workers

- Knowingly hiring or continuing to employ unauthorized workers. Knowing violations occur when employers employ individuals that they know or should know are unauthorized to work.
- Correctable?
 - Yes, if the employer is willing to redress wrongs it knowingly committed
- Employer should make corrections immediately, such as eliminating future knowing acts and addressing all prior missing or erroneous Forms I-9

Hiring of Unauthorized Workers: Penalties

Cease and desist order

For violations that occurred on or before November 2, 2015, fine of:

- \$375 to \$3,200 for each unauthorized worker, for a first offense;
- \$3,200 to \$6,500 for each unauthorized worker, for a second offense; and
- \$4,300 to \$16,000 for each unauthorized worker, for a third and any subsequent offenses

For violations that occurred after November 2, 2015, with penalties assessed on or after January 27, 2017 (or between August 1, 2016 and January 27, 2017), fines of:

- \$548 to \$4,384 (\$539 to \$4,313) for each unauthorized worker, for a first offense;
- \$4,384 to \$10,957 (\$4,313 to \$10,781) for each unauthorized worker, for a second offense; and
- \$6,575 to \$21,916 (\$6,469 to \$21,563) for each unauthorized worker, for a third and any subsequent offenses

➤ Hiring Unauthorized Workers (pattern or practice)

- Engaging in a pattern or practice of violating INA § 274A(a)(1)(A) and (a)(2) (8 U.S.C. § 1324a(a)(1)(A) and (a)(2)) (INA § 274A(f) (8 U.S.C. § 1324a(f))). Employers that employ unauthorized workers regularly and intentionally are engaging in a pattern or practice of violating IRCA.
- Correctable?
 - Yes, if the employer is willing to redress wrongs it knowingly committed
- Employer should make corrections immediately, such as eliminating future knowing acts and addressing all prior missing or erroneous Forms I-9
- An employer knowingly engaging in a pattern or practice of IRCA violations may be unlikely to correct that behavior

➤ Paperwork Violations

- Paperwork violations occur when employers fail to properly complete the Form I-9 process required by IRCA (INA § 274A(b))
- Errors on the Form I-9 may be correctable during an employer's self-audit of its Forms I-9
- If errors are identified during an ICE audit, the employer's ability to correct the errors and reduce the penalty assessed against the employer depends on whether the failure is a substantive or technical violation
- Employers performing their IRCA employment verification obligations in good faith are given ten business days from ICE's notice of technical or procedural failures to correct technical violations. After ten days, uncorrected technical violations are considered substantive violations, subject to civil penalties.

➤ Paperwork Violations (continued)

- Errors made on the Form I-9 Section 1 must be corrected by the employee, and those made in Sections 2 or 3 must be corrected by the employer. Whether done during a self-audit or after ICE notification, errors should be corrected by:
 - Drawing a line through any incorrect information (but not obliterating the incorrect information)
 - Inserting the correct information
 - Initialing and dating the change

➤ Paperwork Violations (continued)

Section One:

- Employee omits her complete printed name (Substantive)
- Employee does not provide her maiden name, address or birthdate (Technical)
- If the employee indicates she is an LPR, failing to include her A number (permanent USCIS file number) (Only required if employer is enrolled in E-Verify)
- If the employee indicates she is an alien authorized to work, failing to include her A number or admission number (Substantive)
- Employee fails to sign Section 1 (Technical)
- Employee dates Section 1 after her first date (Technical)
- Translator fails to provide her required information (Technical)
- Employer pre-populates Section 1 for employee (Unknown)

➤ Indemnity Bonds

- Employers cannot require an employee to pay an indemnity bond
- Penalties:
 - An administrative order requiring return of the any indemnity bond
 - For violations that occurred on or before November 2, 2015, a fine of \$1,100 for each violation. For violations that occurred after November 2, 2015, with a penalty assessed on or after January 27, 2017 (or between August 1, 2016 and January 27, 2017), a fine of \$2,191 (\$2,156) for each violation.

➤ DHS Audit Power

- On February 20, 2017, DHS issues a memo implementing EO 13768. The memo outlines internal DHS guidance, and broadly expands the agency's enforcement efforts, including apprehending, detaining, and removing foreign nationals who are present in the US without authorization.
- January 2018: ICE announced a revised worksite enforcement strategy targeting employment law violators
- Since 2018, ICE has greatly increased its worksite enforcement activities and employers should be prepared to respond to a Notice of Inspection

➤ Tools Utilized by ICE

- Audits
- Administrative arrests of unauthorized workers who are then asked to testify against the employer
- Reviewing no-match records
- Reviewing E-Verify records of participating employers

➤ ICE's Investigative Techniques

- Criminal search and arrest warrants
- Informants
- Consensual monitoring
- Undercover operations
- Surveillance

➤ The Audit

- Notice of Inspection
- Possible issuance of a warrant or subpoena to compel production of documents or testimony
- Usually requests Form I-9s but may also request:
 - Copies of documents presented in the I-9 process
 - Payroll records
 - Business documents, such as articles of incorporation or licenses
 - Tax statements

➤ Responding to An I-9 Audit

- Agencies seeking to inspect Form I-9s MUST provide advance notice of at least 3 days
- Employers should promptly inform ICE if the Forms I-9 are kept in a different location

➤ Scope of Investigation

- ICE may review all Forms I-9 or a sampling of forms
- What they're looking for:
 - Whether a form exists for each person hired after Nov. 6, 1986
 - Timely completion
 - Proper completion
 - Authenticity
 - E-verification participation (if applicable)
 - SSN no-match procedures

➤ Disposition

- Notice of Inspection Letter (compliance letter)
- Notice of Suspect Documents
- Notice of Discrepancies
- Notice of Technical or Procedural Failures
- Warning Notice
- Notice of Intent to Fine

➤ Notice of Suspect Documents

- Although ICE does not tell the employer what action to take regarding its findings, ICE may issue a Notice of Suspect Documents to:
 - Warn the employer that it has determined that employees named in the notice are unauthorized to work
 - Instruct the employer that it may present additional documents if it believes the determination is wrong
 - Describe possible civil and criminal penalties for continuing to employ a worker known to be unauthorized

➤ Notice of Discrepancies

- A Notice of Discrepancy advises the employer that ICE was unable to determine the employment eligibility of the employees named in the notice
- Employers are instructed to give each employee named in the notice a copy of the notice and an opportunity to present ICE with additional evidence of work authorization

➤ Notice of Technical Failures

- A Notice of Technical or Procedural Failures advises the employer that ICE found technical violations of the Form I-9 paperwork, and gives the employer ten days to correct them. Examples of technical violations include minor data omissions such as:
 - The employee's date of birth
 - The employee's maiden name
 - The employee's date of rehire
- After ten days, uncorrected technical violations are considered substantive violations, subject to civil monetary fines

➤ Warning Notice

- A Warning Notice is discretionary and may be issued if substantive violations are identified, but ICE:
 - Determines the violations do not warrant assessment of a civil monetary fine.
 - Expects the employer's future compliance with IRCA

➤ Notice of Intent to Fine

- A Notice of Intent to Fine (NIF) identifies violations found by ICE and the civil monetary penalties assessed for:
 - Substantive violations
 - Uncorrected technical violations
 - Violations of the prohibition that employers knowingly hire or continue to employ unauthorized workers
- IRCA authorizes criminal penalties for violators that engage in a pattern or practice of knowingly hiring or continuing to employ unauthorized workers

➤ Notice of Fine Responses

- Comply
- Seek settlement
- Request a hearing
- Do nothing

➤ Best Practices

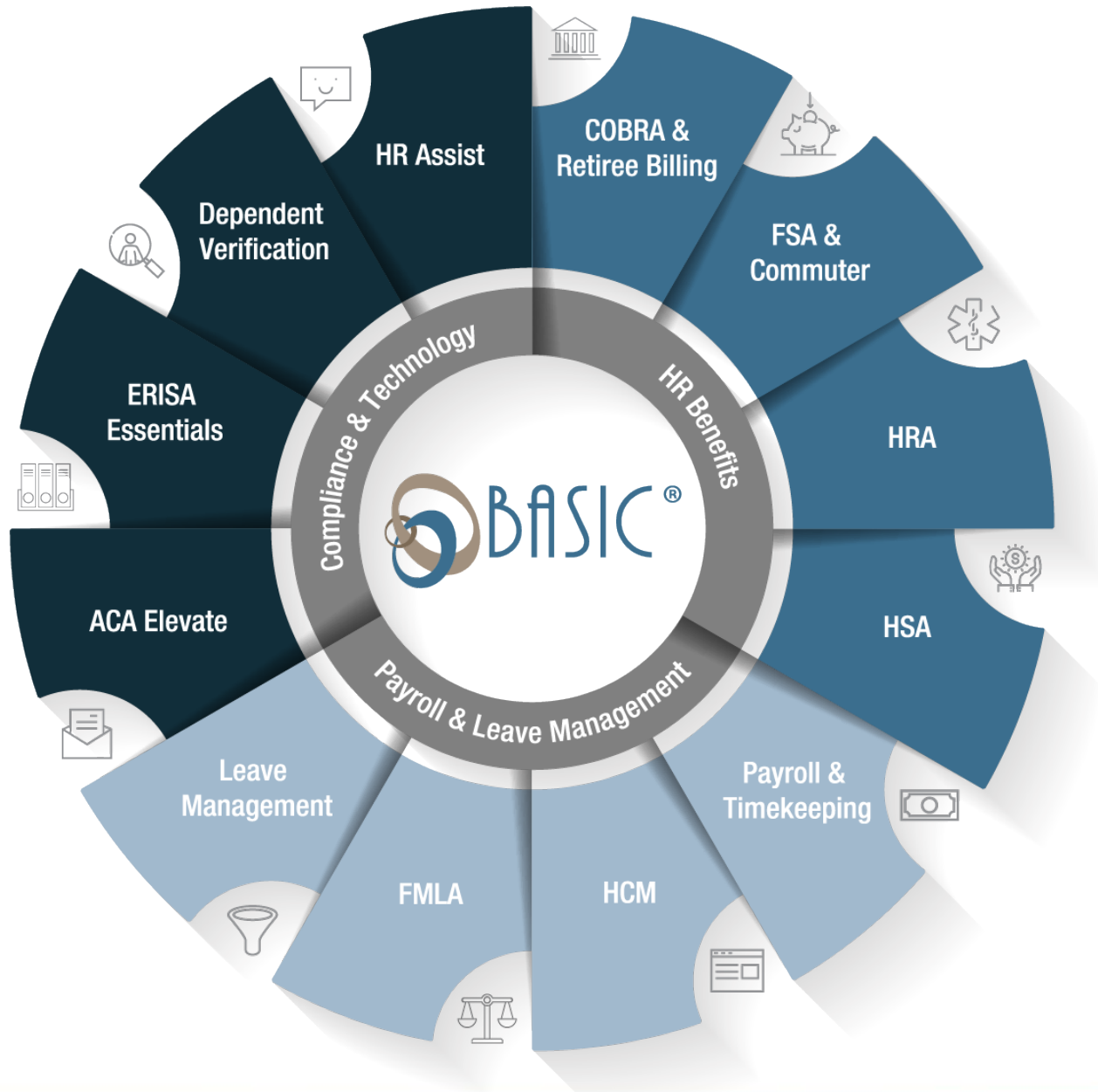
- Train employees working with Form I-9
- Detail Form I-9 process
- Detail E-Verify “No Match” process
- Self-Audits
- Comply with audits
- Get help if needed

➤ Best Practices (continued)

- Consider a written policy
 - Affirm the employer's commitment to IRCA
 - Specify that employees must follow the policy
 - Describe the penalties that may accrue for a failure to comply, including civil and criminal penalties and potential personal liability
 - Ensure administrative consistency
 - Prohibit discrimination
- Provide training on the policy
- Consider establishing an Immigration Officer Role

QUESTIONS





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